

CALIFORNIA ENERGY COMMISSION

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**STATE OF CALIFORNIA**

**Energy Resources Conservation
and Development Commission**

In the Matter of:)	Docket No. 99-AFC-1
)	
Application for Certification)	COMMITTEE ORDER RE
for the Elk Hills Power)	MOTIONS TO CLOSE RECORD
Project (ELK HILLS))	AND STRIKE CURE S REPLY
-----)	BRIEF

I. COMMITTEE ORDER

Having duly considered the written motions of the parties, argument by counsel and the record as a whole, the Committee makes the following findings:

1. At the March 9, 2000, evidentiary hearing on the topic of Soil and Water Resources, the Committee ordered the parties to brief the meaning of the term *economically unsound* in the context of wet versus dry cooling under an analysis of the State Water Board Policy on the Use of Inland Waters for Power Plant Cooling (SWRCBR 75-58). (3/9/00 RT 249:4-258:5.)
2. On April 4, and 11, 2000, respectively, pursuant to the Committee s briefing order, the parties filed timely opening and reply briefs.
3. Thereafter, over the objection of Applicant who moved to close the evidentiary record on the topic of Soil and Water Resources, the Committee scheduled a hearing for May 2, 2000, to consider new testimony on the respective parties contentions regarding SWRCBR 75-58.
4. Before the May 2, 2000 hearing, Applicant, in addition to its motion to close the evidentiary record, joined a motion by Staff to strike portions of the reply brief filed by the California Unions for Reliable Energy (CURE).

5. The parties appeared at an evidentiary hearing on May 2, 2000, where they offered, and the Committee accepted, new testimony in support of their respective positions on the application of SWRCBR 75-58.
6. The parties' briefs will remain part of the administrative record in this proceeding.
7. CURE's reply brief on Phase II issues (marked as Exhibit 42 for identification), although part of the administrative record in this proceeding, is not part of the evidentiary record upon which the Committee may rest findings.
8. The Committee is persuaded that the evidentiary record is now complete with respect to the matters called for in its March 9, 2000 briefing order on SWRCBR 75-58.
9. The motions to strike CURE's reply brief from the administrative record in this proceeding are **DENIED**.
10. Except for matters of which the Committee may take official notice, the motion to close the evidentiary record on Soil and Water Resources is **GRANTED**.

II. BACKGROUND

On April 14, 2000, the Applicant filed a Motion to Close the Evidentiary Record on the subject of **Soil and Water Resources**.¹ On April 18, 2000, Staff filed a motion to strike.² On May 1, 2000, Applicant filed a Motion (Motion 3) to join Motion 2. CURE filed responses to Motions 1 and 2. The three respective motions were heard together at a hearing on May 2, 2000, wholly devoted to the issues surrounding the Committee's interpretation and application of SWRCBR 75-58.³ (5/2/00 RT.)

¹ Motion to Close the Evidentiary Record, or in the Alternative, to Limit the Scope of Any Further Testimony or Hearing Concerning Water Resources, filed on April 14, 2000. (Motion 1.)

² Motion to Strike Portions of CURE's Reply Brief of Phase II Issues in the Elk Hills Power Project Application for Certification, filed on April 18, 2000. (Motion 2.)

³ SWRCBR 75-58 establishes an order of priority for use of water sources for power plant cooling. The stated priorities are (1) wastewater being discharged to the ocean; (2) ocean water; (3) brackish water from natural sources or irrigation return flows, (4) inland waste waters of low TDS; and (5) other inland waters. In addition, SWRCBR 75-58 states that fresh inland waters should only be used for power plant cooling if other *sources* or other *methods* of cooling would be *environmentally undesirable* or *economically unsound*. (Ex. 19A, p. 2; Ex. 19B, pp. 4-5; 1, pp. 5.4-16-5.4-18; 39.)

The motions arose from the matters contained in CURE s reply brief on Phase II issues.⁴ At the May 2, 2000, hearing, the Committee received oral argument from the parties on their respective motions, and took them under submission. (5/2/00 RT 4:14-26:19.)

III. DISCUSSION

At the conclusion of the March 9, 2000, evidentiary hearing, the Committee ordered the parties to brief the meaning of the term *economically unsound* in the context of wet versus dry cooling under an analysis of SWRCBR 75-58 s applicability. (3/9/00 RT 249:4-258:5.)⁵ The parties filed timely opening and reply briefs on Phase II issues that included matters the Committee deemed to be new testimony under the *economically unsound* SWRCBR 75-58 analysis.

Staff s opening brief included Attachment A-Water and Power Plant Cooling Supplemental Testimony of Matthew S. Layton and Joe O Hagan. Attachment A was received into evidence at the May 2, 2000 hearing. (Ex. 19C.) Applicant s brief included Appendix I, which set forth a wet versus dry-cooling cost comparison under the *economically unsound* SWRCBR 75-58 analysis. Attachment I was also received into evidence on May 2, 2000. (Ex. 40.)

CURE s opening brief contained Table 1⁶ and five appendices, which were attached as exhibits to its opening brief. CURE moved to submit the entire reply brief and attachments into evidence. (5/2/00 RT 138:15-139:11.) Applicant and Staff lodged

⁴ Phase II testimony included two topics: Biological Resources and Soil and Water Resources. (3/9 RT.) The record on Biological Resources was closed after testimony was received on March 9; however, the record on Soil and Water Resources was left open pursuant to the Committee s briefing order. (3/9 RT 40:11-17: 253:13-255:25.)

⁵ On March 14, the Committee agreed, at the request of the parties, to allow consolidated briefs on the specific SWRCBR 75-58 question within the context of overall briefing on Phase II issues, as previously scheduled. Thus the Phase II briefs covered both Biological Resources, Soil and Water Resources, and specifically, SWRCBR 75-58.

⁶ Table 1-Installed Capital Cost for Two Cooling Systems.

evidentiary objections to the admission in its entirety of CURE's opening brief supplemented by Table 1 and five appendices. (5/2/00 RT 139:12-142:14.) The Committee ruled that only an explanatory section 2D, Table 1 and five supporting appendices from CURE's opening brief were admissible as evidence.⁷ (5/2/00 RT 175:20-180:16; Ex. 41.)

The pending motions before the Committee involve solely those matters contained within CURE's reply brief that Applicant and Staff find objectionable. (5/2/00 RT 181:24-182:19.)⁸ In Motion 1, Applicant argues that CURE in its reply brief improperly raises new issues related to water supply environmental impacts under a CEQA analysis that are outside the scope of the Committee's March 9 briefing order. In Motions 2 and 3, Staff (joined by Applicant) makes the identical contention in its motion to strike specified portions of CURE's reply brief. CURE argues that its reply brief is proper rebuttal of positions taken by Applicant and Staff in their respective opening briefs on SWRCBR 75-58.

In Commission proceedings, the administrative record consists, *inter alia*, of (1) transcripts, and (2) pleadings, written testimony and **briefs** submitted by a party. [Cal. Code of Regs., tit.20, §§ 1214; 1702 (a).] The evidentiary record consists of that part of the administrative record containing testimonial matters or other evidence received under oath from a witness at a hearing. (*Ibid.*) The Committee may not rely on those parts of the administrative record, not included in the evidentiary record, to make a finding. [Cal. Code of Regs. tit. 20, §1702 (h).]

CURE's reply brief on Phase II issues, although part of the administrative record in this proceeding, contains argument based upon matters that are not part of the evidentiary record. Therefore, the Committee may not rely on any matter contained in CURE's reply brief to support any finding of fact.

⁷ Neither Applicant nor Staff objected to the admission of these portions. (5/2 RT 179:15-180:16.)

⁸ CURE's reply brief was marked as Exhibit 42 for identification. (5/2 RT 181:24-182:17.)

Moreover, the Committee does not find it necessary to continue the hearings on SWRCBR 75-58 to allow CURE to make any environmental contentions under a CEQA analysis part of the evidentiary record in this proceeding. CURE never raised these issues at the March 9, 2000 hearing on water resources. The Committee considers those matter as rebuttal arguments, which are outside the scope of the Committee s March 9, 2000, briefing order dedicated to SWRCBR 75-58. To the extent those matters were not presented at the appropriate time under the appropriate topic, CURE has waived its opportunity to raise these new contentions.

Dated: _____
CONSERVATION

ENERGY RESOURCES
AND DEVELOPMENT COMMISSION

MICHAL C. MOORE, Ph.D.
Commissioner and Presiding Member
Elk Hills AFC Committee

ROBERT PERNELL
Commissioner and Associate Member
Elk Hills AFC Committee